UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 10-CR-594 (ERK)

v. :

JOSEPH YANNAI, : Brooklyn, New York
: December 14, 2010

Defendant. :
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TRANSCRIPT OF CRIMINAL CAUSE FOR BAIL HEARING
BEFORE THE HONORABLE JOAN M. AZRACK
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

I N D E X

Witness	Direct	Cross	Redirect	Recross
DEFENDANT:				
Elena Fusillo	8	13	36	--
Barry Nesson	39	54	67	--

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THE COURT: Good morning. Please be seated.

THE CLERK: Criminal Cause for Bail Application, 10-CR-594, United States v. Joseph Yannai.

Counsel, would you please state your appearances for the record?

MR. SPECTOR: Good morning, Your Honor. Daniel Spector for the Government.

MS. JAGER: Good morning, Your Honor. Hilary Jager for the Government.

MS. STONE: Audrey Stone for the Government.

MR. LEVIN: Duncan Levin for the Government. Good morning, Your Honor.

THE COURT: I'm not sure we have time for all these appearances.

MR. SCHNEIDER: Federal Defenders by Michael Schneider for Mr. Yannai. With me is Ben Silverman who is going to be admitted next week but he's been working in our office for the last few months.

THE COURT: Congratulations!

MR. SILVERMAN: Thank you, Your Honor.

THE COURT: Welcome. Okay. I'm listening.

MR. SCHNEIDER: Your Honor, I believe you received the Government's letter and I think it accurately states what the case -- why Judge Korman referred the case here.

We're arguing bail in front of Judge Korman and he would like this Court to make a finding, I think, first of all as to why Mr. Yannai's wife's home is in foreclosure, meaning why she stopped paying the mortgage payments, and also make a finding as to the amount of equity that would be available to the Government if the bond would have to be forfeit. Okay?

THE COURT: U-hum.

MR. SCHNEIDER: So, first of all, I have -- I intend to call as a witness Mr. Nesson --

THE COURT: Well, wait. Do you want to respond to the Government's letter?

MR. SCHNEIDER: I don't. I'll answer your questions at the end but I think it's appropriate for me to put on my evidence --

THE COURT: Why don't you just give me an offer of proof.

MR. SCHNEIDER: Offer of proof is that Ms. Fusillo [Ph.] in 2008 called her lender to modify her loan. The lender -- the person she spoke to at the lender said, "Well, you're current on your payments so we're not going to modify your loan. We don't do that to people who are current." Ms. Fusillo said, "Well, so are you telling me that I have to stop paying for you to consider a modification?" They said so she stopped paying. She then asked for a modification and last week she received a letter from the lender indicating that they were going to modify the loan bringing it down from a 6 3/8 percents point loan to a four and some change percentage loan. She has signed that modification document and she's prepared to send it today with her payment of $1,099.00 for that loan modification.

The Government has made some representations I knew nothing about. That's where we stand now. However, when we prepared for this hearing the house was -- this modification hadn't come through yet and I do have an expert prepared to testify about if the house is foreclosed what sort of equity would be left in the house likely if there's a foreclosure sale.

So I think we should proceed and although it would be more cumbersome than I anticipated, this Court can make a finding as to whether if the house is foreclosed how much equity will likely be available and if the house goes into loan modification or if the loan is modified, how much equity is available. I think that's what Judge Korman wants to know.

MR. SPECTOR: First of all, I mean I do think there's a threshold question about whether or not the house is going to be in foreclosure. We learned this information yesterday. If that's not being disputed, then the Court can accept that as a fact. If that is being disputed we can provide documentation.

Just to sort of --

THE COURT: That it is in fact in foreclosure?

MR. SPECTOR: Correct. And just sort of stepping back, Judge, so you understand it, it was our understanding -- we reached out to defense counsel repeatedly to see what was happening. This is a defense motion to modify the conditions of bail. They had told us this was going to be a status conference. I remember specifically asking Mr. Schneider saying, look, I don't want to be in a position where we're informed the night before that you're calling witnesses. He assured me that wouldn't happen --

THE COURT: Well, this is the day of.

MR. SPECTOR: Yes. Oh, I got an e-mail from him about three o'clock yesterday telling me that.

THE COURT: Oh. Okay.

MR. SPECTOR: So, despite the lack of notice, we're prepared to cross-examine the witnesses to the extent the Court deems that necessary. However, if after the hearing -- I mean it's our view even after the hearing the Court will find that the property is unacceptable and that there's no equity but if there's any question about that, then we would ask for an opportunity to call our own witnesses at a later date.

THE COURT: All right.

MR. SCHNEIDER: The only issue I have -- well, I'll leave the Government's statements about being surprised aside but I don't -- I understand that this Court is supposed to make a finding about the equity. The question of whether Mr. Yannai should be released, I understand, is going to be Judge Korman's call.

THE COURT: Right. And as I understand it -- and you both could probably tell me more accurately -- has Judge Korman ruled on whether that property can be used?

MR. SCHNEIDER: He has and he has said yes. The Government has alleged that in the indictment that the house is forfeit or can be seized by the Government. I think that Judge Korman at a status conference took a dim view of that and certainly considered allowing the house to be used as security even though it's alleged by the Government that it could be forfeited should he be convicted. I think Judge Korman thinks that's an unlikely event so now we've reached the point of since it may be able to secure the bond he'd like to know how much equity is in the house.

THE COURT: But it's a "may" and it's only if -- it's only going to be considered if there is the requisite amount of equity.

MR. SCHNEIDER: Judge Korman is going to have to consider it. He wants to know how much equity is in the house before he decides.

THE COURT: Okay.

MR. SPECTOR: I agree it's a "may" and not a "will."

THE COURT: Okay. Go ahead.

MR. SCHNEIDER: I'd just ask that our expert be allowed to stay in the audience during --

THE COURT: Fine. That's fine.

MR. SCHNEIDER: Okay. I call Elena Fusillo to the stand.

THE CLERK: Raise your right hand.

(Elena Fusillo, Defendant's Witness, Sworn.)

THE COURT: Please state and spell your name.

THE WITNESS: It's Elena Fusillo. E-L-E-N-A F-U-S-I-L-L-O.

THE COURT: Okay. Go ahead.

MR. SCHNEIDER: Good morning, Ms. Fusillo. Keep your voice up. Okay?

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. Are you married to Mr. Yannai?

A. I am.

Q. And do you own a home at 309 Salem Road in Pound Ridge, New York?

A. I do.

Q. And how long have you owned that home?

A. For nine years now.

Q. At some point did you refinance the mortgage for that home?

A. Yes.

Q. And the last refinancing, do you remember when that

occurred?
A. That was in 2007.
Q. At some point did you stop paying the mortgage payments on that loan?
A. I did.
Q. And about when was that?
A. End of 2008.
Q. And how did it come about that you stopped making the mortgage payments on that loan?
A. There was a lot on the news about loan modifications and availability for them so I called the bank and asked them about the loan modification possibility for my house. They told me that I was not going to be eligible because I was current in my payments. So I asked them, "Are you telling me that I should stop paying in order to become eligible" and they said yes so I stopped paying.
Q. Do you remember what the interest rate was on that loan?
A. It was 6 3/8ths.
Q. And based on that conversation what did you do?
A. I stopped paying.
Q. And did you request a loan modification?
A. Yes, I submitted loan documentation -- loan modification documents to the bank.

MR. SCHNEIDER: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. SCHNEIDER:

Q. I'm going to show you what's been previously marked as Defendant's Exhibit C and A.

MR. SCHNEIDER: I think the Court has a copy of these as does the Government.

THE COURT: I do.

BY MR. SCHNEIDER:

Q. Have you seen those before, Ms. Fusillo?

A. I have.

Q. And what is Defendant's Exhibit A?

A. That's the assessment on the house.

Q. The appraisal?

A. The appraisal on the house; yes.

Q. And did you arrange for that appraisal?

A. I did.

Q. And you paid the appraiser for that?

A. I did.

Q. And do you recall what you told the appraiser the reason you were getting an appraisal?

A. It was for insurance purposes.

MR. SCHNEIDER: All right. I offer Defendant's Exhibit A into evidence, Your Honor.

MR. SPECTOR: And this is the appraisal?

MR. SCHNEIDER: Yes.

MR. SPECTOR: I know that the Rules of Evidence don't really apply here but to the extent that they did we'd have an objection. This is not really an appropriate witness to put in an appraisal.

THE COURT: That's true.

MR. SCHNEIDER: Well, Your Honor, we can call the appraiser at some point if you think that's appropriate.

I think that at this point in a bail hearing I'd ask the Court to consider this appraisal.

(Defendant's Exhibit A, Received.)

THE COURT: I'll receive it.

MR. SCHNEIDER: Thank you.

BY MR. SCHNEIDER:

Q. Now, the other document, Defendant's Exhibit C. What's that?

A. That's the loan modification.

Q. And when did you receive that?

A. This past weekend.

Q. And what -- well, have you -- did you have a lawyer representing you in your modification request?

A. I did. I did.

Q. And have you discussed that document with your lawyer?

A. I have.

Q. And do you intend to sign that loan modification and send in your payment?

A. I have signed it and today I'm going to be sending in payment.

MR. SCHNEIDER: All right. I ask that Defendant's Exhibit C be admitted into evidence, Your Honor.

MR. SPECTOR: No objection.

(Defendant's Exhibit C, Received.)

THE COURT: Received.

BY MR. SCHNEIDER:

Q. Where do you work, Ms. Fusillo?

A. Euro Pacific Capital.

Q. And how long have you worked there?

A. Two and a half years.

Q. And about how much do you earn per year?

A. $80,000.00.

Q. Do you have any dependents?

A. No.

Q. Aside from the home -- well, you live at this home in Pound Ridge; right?

A. Yes.

Q. Aside from that home do you have any other assets?

A. Other than my checking account and furniture; no.

Q. And how much money do you have on hand in your checking or savings account?

A. $60,000.00.

Q. Would that money be available if this loan modification

for some reason isn't -- doesn't go through would that money be available to pay off your arrears on the mortgage?
A. Yes.
Q. As you sit there now do you know how much the arrears are?
A. About $70,000.00. $70,000.00.
Q. And would you -- do you think you'd be able to get the rest of that money to pay off the arrears if you had to?
A. Yes.
Q. Where would you get it?
A. From family.
MR. SCHNEIDER: No further questions, Judge.
THE COURT: Okay. Cross-examination.
MS. JAGER: Good morning, Ms. Fusillo.
THE WITNESS: Good morning.

CROSS EXAMINATION

BY MS. STONE:
Q. Now, Ms. Fusillo, you mentioned during your direct examination that you received a loan modification agreement from the bank this weekend. Is that correct?
A. That's correct.
Q. And you're intending to sign it; correct?
A. I signed it already.
Q. Okay. Now, the bank hasn't signed that; correct?
A. I haven't returned it.
Q. But the bank hasn't signed it yet; correct?

A. Not until they receive it.
Q. And this would not be a binding document until it's been signed by the lender a well; correct?
MR. SCHNEIDER: Judge, we'll stipulate to that. She's not a lawyer.
THE COURT: So stipulated. Go ahead.
BY MS. STONE:
Q. Now, Ms. Fusillo, you stated on your direct examination that you were told by the bank that to qualify for the loan modification you needed to stop paying your mortgage?
A. Yes.
Q. Did you receive a letter from the bank confirming that that would be the process for a loan modification?
A. No.
Q. Do you have any other evidence of this phone call that you had with the bank?
A. No.
Q. Can you tell us the name of the person you spoke to at the bank?
A. I cannot.
Q. Now, you also as part of this loan modification process, Ms. Fusillo, you were asked to submit an affidavit. Isn't that correct?
A. Yes.
Q. And you were asked on the affidavit to verify that

everything you were telling them was truthful; correct?
A. Yes.
Q. And you work in the finance industry; correct?
A. Yes.
Q. You work with numbers and finances?
A. I work on the compliance side.
Q. Okay. So you're familiar with financial affidavits; correct?
A. No, not really.
Q. Well, you know enough about financial affidavits to fill out what your basic expenses would be; correct?
A. Yes.
Q. And your income; correct?
A. Yes.
Q. Okay. Now, as part of that affidavit you were asked to list various expenses such as your heating bill and food and utilities; correct?
A. Yes.
Q. And you listed on this affidavit that utilities were $320.00 a month. Is that correct?
A. Yes.
Q. Okay. And you were also asked to submit a recent bank statement. Do you recollect that?
A. Yes.
Q. And you attached a bank statement from Chase Manhattan;

yes?
A. Chase bank; yes.
Q. That's where you bank; correct?
A. That's correct.
Q. And it was an account from August 12th through September 13th statement; correct?
A. I presume so. I mean I don't know what you're referring to specifically but I have submitted various bank statements.
Q. Okay. And on that statement it did list a charge for $349.13 to Casey Fuel. Is that correct?
A. If that's what the statement says.
Q. Okay. The other thing is that you were asked to list your monthly food expenses; correct?
A. Yes.
Q. And on that worksheet you listed $50.00 for your monthly food expenses. Is that correct?
A. Right.
Q. Okay. Ms. Fusillo, that would be, I guess, about $12.00 a week. Is that a fair breakdown of what you're submitting as your monthly food expenses to the bank?
A. Well, that would be $50.00 a month --
Q. $50.00 a month --
A. -- I make all my purchases at once.
Q. Okay. So about $12.00 or $13.00 a week?
A. If that's the math.

Q. Okay. Well, that would leave you about, what, $2.00 a day for food. Is that correct? If you listed $50.00 a month --
A. For food expenses, that's correct.
Q. Yes. Okay. So what do you eat for breakfast, Ms. Fusillo?
A. I have breakfast sausages.
Q. And for lunch?
A. I have something from the previous night's leftovers.
Q. Okay. And then what would you normally have for dinner?
A. Something that is either leftover or something that's in the freezer.
Q. Okay. And it's your testimony that that costs you about $2.00 a day for those three meals?
A. Yes.
Q. Okay. Now, the other thing that you listed as far as your expenses is you were asked about clothing. Do you remember that?
A. Yes.
Q. And you listed no expenses on clothing. Is that correct?
A. That's correct.
Q. Now, Ms. Fusillo, you work as a compliance officer; correct?
A. That's correct.
Q. And you dress professionally like you're dressed today. Is that fair to say?

A. That's correct.
Q. And in order to dress for work you need to clean your clothes; don't you?
A. Yes, in the washer.
Q. Okay. Well, you do use a dry cleaner as well; correct?
A. I don't have very many dry cleanable things.
Q. Okay. But at times you use a dry cleaner?
A. Very rarely.
Q. Okay. Well, your husband uses a dry cleaner, doesn't he, for his shirts?
A. My husband is not at home any longer.
Q. But when you listed your expenses here you said that both you and your husband lived in the home. Isn't that correct?
A. That's correct.
Q. Now, you also were asked about medical expenses and you listed $25.00 and is that your monthly medical expenses, Ms. Fusillo?
A. That's correct.
Q. Okay. And who pays for your health insurance?
A. I do but that's deducted from my paycheck.
Q. Okay. Well, so then how much is deducted from your paycheck for health expenses?
A. That's included on a previous part of that form.
Q. Okay. But what is deducted? Do you know what's deducted from your paycheck?

A. Somewhere between $200.00 and $300.00 --
Q. Okay. And how many times --
A. -- a month.
Q. Oh, $200.00/$300.00 a month?
A. Right.
Q. Okay. And do you also have dental insurance?
A. No, I don't.
Q. Okay. So how many times a year do you go to the dentist, Ms. Fusillo?
A. I have not gone to the dentist for a year now.
Q. For a year. Okay. And when you go to the doctor do you have a co-pay.
A. I don't have a co-pay but I haven't been to the doctor for a year either.
Q. Okay. So, now your husband he goes to the doctor, doesn't he?
A. When he was at home he did; yes.
Q. And did you have any medical expenses relating to his doctor's visits?
A. It depends on what part of the cycle of the premium. If the premium is paid there are no expenses.
Q. Well, Ms. Fusillo, let me ask you another question about your medical expenses. Over the course of the last several years you've had various assistants who were living in your home; correct? Personal assistants?

MR. SCHNEIDER: Objection.

MS. STONE: Your Honor, we are -- do have information that the defendant was paying for medical expenses for other people.

THE COURT: And that's where you're going with this question?

MS. STONE: Yes.

THE COURT: Overruled.

MR. SCHNEIDER: Judge, I'd just ask that they give a time period.

THE COURT: Okay. Why don't you try to designate a time period, you know, because it was kind of broad and I'm going to let you lead her a bit here because I think I know what you're concerned about with this line of questioning and I think some of the information is necessary to the -- for the purposes of the hearing. So, go ahead.

BY MS. FUSILLO:

Q. Let me specifically ask you, you had an assistant named Giselle Lunkus [Ph.], who lived --

MR. SCHNEIDER: Objection.

MS. STONE: I'm trying to point her to the exact information I know in terms of medical expenses.

THE COURT: You're just trying to get at whether they paid medical expenses for this --

MS. STONE: Correct.

THE COURT: Is that right?

MS. STONE: Correct.

THE COURT: Okay. Why is that objectionable?

MR. SCHNEIDER: Can we have a time period of --

THE COURT: For that person?

MR. SCHNEIDER: I assume this is all for impeachment. If she filled out a form and that person wasn't there is completely irrelevant. The question isn't necessarily her income, the question is why she stopped paying the mortgage. She's testified to that. I assumed this was all impeachment but this is improper impeachment if they're saying, you filled out a form at a time this woman didn't live here, did you pay expenses for her the year before?

THE COURT: Well, if it was at a time when the woman didn't live there I don't think it's relevant.

MS. STONE: Your Honor, I'll move on.

THE COURT: All right.

BY MS. STONE:

Q. Now, on the affidavit that you filled out for the loan modification you didn't list any expenses for your pets; correct? Oh, no, I think you listed $31.94. Is that --

A. That's correct.

Q. But now on the statement that you submitted from Chase there is a charge for -- I'm sorry, I'm going to correct that. You use South Salem Animal Hospital; correct?

A. Occasionally; yes.
Q. Okay. And how many pets do you have?
A. One.
Q. You have a dog?
A. I do.
Q. Okay. And in August you took your dog twice to South Salem Animal Hospital. Is that correct?
A. If that's what the statement shows.
Q. And each of those times you paid $31.94 for the visit; correct?
A. That's correct.
Q. But on the affidavit you didn't list any expenses regarding your dog. Isn't that correct?
A. Well, what's the date of the affidavit?
Q. The date of the affidavit would be in October of 2010.
A. That was just an oversight on my part.
Q. How much do you pay for food for your dog?
A. About $10.00 a month.
Q. And how much do you pay for grooming for your dog every month?
A. She doesn't get groomed.
Q. So she never gets groomed?
A. Occasionally, she may have a bath.
Q. Okay. And who bathes her?
A. I do.

Q. Okay. Now, you also listed your income on this financial affidavit to the bank; correct?
A. Right.
Q. And you wrote them a letter and you discussed your salary in that letter to the bank as well?
A. Okay.
Q. Is that a yes or a no, Ms. Fusillo?
A. If that's what you have in front of you, then yes.
Q. Okay. Now, in terms of your income you listed -- there were some worksheets that were part of this affidavit; correct?
A. Yes.
Q. And on that worksheet you listed a monthly gross wages of $6,668.00. Is that correct?
A. Can I --
MR. SCHNEIDER: Your Honor, can we have her get a copy of whatever the Government is reading from?
THE WITNESS: Yes.
THE COURT: Do you have a copy?
MR. SCHNEIDER: No.
THE COURT: Do you have a copy?
[Pause in proceedings.]
THE COURT: Do you want another copy made? Do you have enough? Do you have one for the witness?
Is that what you wanted; the witness to have one?
MR. SCHNEIDER: Yes.

THE COURT: Yes. That's what I thought.

MR. SCHNEIDER: Yes. Thank you.

[Pause in proceedings.]

MR. SPECTOR: May I approach, Your Honor?

THE COURT: Okay. So you've handed the witness a copy of her -- is that her financial affidavit?

MS. STONE: That is correct, Your Honor. It's a request for a modification and affidavit.

THE COURT: Okay. Is it part of an exhibit? Do you want to mark it? What do you want to do? Or you want her just to have it just in case she needs it to refresh her recollection?

MS. STONE: Your Honor, just in case she needs to refresh her recollection.

THE COURT: Okay. Go ahead.

BY MS. STONE:

Q. So, Ms. Fusillo, if you'll note on the third page there is a worksheet that you completed. Do you see that, Ms. Fusillo?

A. Yes. Yes, I do.

Q. Oh, I'm sorry, on the second page of what you have it says "monthly gross wages, $6,680.00." Is that correct?

A. That's correct.

Q. Okay. And then you were asked, if you now turn to the fifth page of what we handed you, you see a request for monthly income. Do you see that page?

A. Is that the page with "general information?"
Q. Yes.
A. Monthly income. Yes.
Q. And you listed a net amount of $4,846.00; correct?
A. That's correct.
Q. And a bi-monthly gross of $6,668.00; correct?
A. That's correct.
Q. And that would be different than what you listed on the first page that you looked at; correct? That's a different amount?
A. The monthly gross wages matches the monthly gross wages on the two pages.
Q. Ms. Fusillo, if you return to the second page, you listed a monthly gross income of -- you listed a bi-monthly gross here of $6,668.00; correct?
A. On what page are you?
Q. I'm sorry if I'm confusing you from the pages.

THE COURT: You know what, we're going to mark this.

MS. STONE: Okay.

MR. SPECTOR: We'll mark it as Government Exhibit 1, Your Honor. Thank you.

(Government's Exhibit No. 1, Marked.)

THE COURT: Okay. You can name it Exhibit 1. All right.

BY MS. STONE:
Q. So in the Government's exhibit, Ms. Fusillo -- do you have that now -- the gross amount is listed as $6,668.00; correct?
A. That's on Page 2?
Q. Again, this is on the page that states "general information" --
A. The gross amount is $6,668.00. That's correct.
Q. Okay. Now, in your 2009 tax return you listed wages of $80,683.00. Is that correct?
A. If that's what it says.
Q. And here --
A. What year was that?
Q. For 2009.
A. Okay.
Q. And here on the page you've just been looking at on the general information concerning your monthly income you listed a net bi-weekly pay of $4,846.00. Is that correct, Ms. Fusillo?
A. But this is dated 2010.
Q. Ms. Fusillo, didn't you in your letter to the bank indicate that you expected that your annual income would be approximately the same in 2010 as it had been in 2009?
A. I don't recall doing that but if you have the letter.
MR. SCHNEIDER: The first page should be the letter.
MR. SPECTOR: May I approach, Your Honor?
THE COURT: Yes.

[Pause in proceedings.]

BY MS. STONE:

Q. Ms. Fusillo, on the first page of your exhibit -- oh, you don't have the letter -- Ms. Fusillo, when you submitted your loan modification affidavit you wrote a letter to the bank; correct?

A. Yes.

Q. And in the letter you wrote that you had an annual -- "I receive some relief by the fact that my salary was increased this year from $75,000.00 to $80,000.00. In addition, I received a $6,000.00 bonus which makes my salary this year $86,000.00." Did you or did you not write that in the letter to the bank?

A. If you have the letter there, then I did.

Q. Now, we're turning again to the financial affidavit. You listed a net bi-monthly of $4,846.00. Is that correct, Ms. Fusillo?

A. I don't have the --

Q. Again, that's the page we've been looking at.

A. I don't have it in front of me.

THE COURT: I thought she had it in front of her now.

MS. STONE: That is what we've been discussing all the time.

THE WITNESS: I think he took --

MR. SCHNEIDER: They took it away.

MR. SPECTOR: May I approach, Judge? I'll give her my copy.

THE COURT: Yes, please. This is not how we need to be spending our time. Let's make sure she's on the same page as counsel.

THE WITNESS: Okay.

BY MS. STONE:

Q. Ms. Fusillo, you listed a net amount of $4,846.00; correct?

A. That's correct.

Q. Now, that's a bi-monthly amount; correct?

A. No.

Q. A bi-weekly amount?

A. No, that's monthly.

Q. That's monthly but that's not what you wrote on your financial affidavit did you?

A. Where does it say not monthly?

Q. It says, "How often do you get paid" and you wrote "bi-weekly." And then it asks, "What is the net amount?" You wrote $4,846.00.

A. But that amount is under "monthly income." The question is separate from this section that indicates monthly income.

Q. So just to be clear you're saying that your net amount each month was $4,846.00 then?

A. Yes.

Q. Okay. Now, you also listed $34.90, I believe, as your phone charges. Is that correct? How many phones do you have?

MR. SCHNEIDER: Judge, I'm going to object to this. We've gone well beyond the scope of the direct and the scope of this hearing.

MS. STONE: Okay. I'll move on from the expenses, Your Honor.

THE COURT: Thank you.

BY MS. STONE:

Q. Ms. Fusillo, let me ask you something. When your case -- your home went into foreclosure you also had additionally a pending civil suit with the Bank of America. Isn't that correct?

A. Not to my knowledge.

Q. Well, on July 1, 2010 you were sued by the Bank of America. Isn't that correct?

A. Again, I'm not aware of that?

Q. Well, on July 1st there was a lawsuit filed in Westchester County and you were served with papers indicating that the Bank of America was seeking $13,293.02. Is that correct?

A. Not to my knowledge.

Q. So it's your testimony here that you weren't --

MR. SCHNEIDER: Objection. Asked and answered.

THE COURT: Overruled.

BY MS. STONE:
Q. So it's your testimony that you were not served in this lawsuit?
A. I don't recall getting any documents.
Q. Well, are you aware of this lawsuit?
A. No, I'm not.
THE COURT: That she asked and answered.
MS. STONE: Okay.
BY MS. STONE:
Q. And you also have a judgment from 2004 with NCO Portfolio Management in New Jersey; correct?
A. I'm unaware of that.
Q. Well, on January 2, 2004 there was a judgment for $6,051.00 from NCO. Is that correct?
A. I am unaware of that.
Q. You're unaware of that judgment against you. And there's another judgment against you from October 23, 2003 from NCO Portfolio Management. Are you aware of that judgment?
A. No, I am not.
Q. And there's a judgment -- I'm sorry. Who is Mary Fusillo?
THE COURT: Who is what?
MS. STONE: Mary Fusillo.
BY MS. STONE:
A. That's my mother.
Q. Okay. So there's a judgment with your mother from 2000

with New Century Financial Services for $7,000.00 --

MR. SCHNEIDER: Objection to relevance.

THE COURT: Wait. Is the judgment with her mother in which she's a co-defendant?

MS. STONE: Yes.

BY MS. STONE:

Q. You and your mother are a co-defendant on a judgment with New Century Financial Services for $7,922.00. Isn't that correct?

A. I am unaware of that.

Q. So you're unaware of three outstanding judgments against you. Is that what you're testifying?

A. Right.

Q. And you're also unaware of the lawsuit that's been filed in Westchester County against you by Bank of America. Is that correct?

A. That's correct.

Q. I just have a couple of other questions, Ms. Fusillo. You also talked about your assets when you were seeking a loan modification with the bank. Isn't that correct?

A. Yes.

Q. And you testified here this morning concerning your assets; correct?

A. Correct.

Q. And you said that your only assets was your checking account and your furniture. Is that correct?

A. That's correct.

Q. Now, when you were negotiating with the bank and you were asked about your assets you also listed a coin collection. Isn't that correct?

A. Not to my knowledge.

Q. Well, an art collection. You were asked about --

A. Well, that's what I meant by furniture. The interior of the house. Everything that's in the house.

Q. So you were including in terms of your assets all of your art. Is that correct?

A. On what document? On the document or in my testimony --

Q. Are you saying that your testimony today when you said you were discussing furniture as your assets that, really, you meant art and collectibles?

A. I meant everything in my house. I meant furnishings is what I should have said.

Q. Okay. And you also own two automobiles; correct?

A. I own four automobiles.

Q. And you also own a computer. Isn't that correct?

A. That's correct.

MS. STONE: Okay. I have no further questions.

MR. SPECTOR: Actually, Judge, I'm sorry. Can we have one moment?

THE COURT: Sure.

[Pause in proceedings.]

MR. SPECTOR: Just a couple of additional questions.

BY MS. STONE:

Q. Ms. Fusillo, when you requested this loan modification from the Bank of America you wrote in your letter that your husband's business was on its way to recovery. Could you please describe to us what you mean by "on its way to recovery?"

A. When was the date of that?

Q. October 13, 2010?

A. He had been working on the preliminary steps of various projects.

Q. And what did you mean by "recovery?"

A. In comparison to what had occurred back in 2008 he was on the way to recovery.

Q. Well, in 2008 what had he contributed to the mortgage, Ms. Fusillo?

A. I was paying the mortgage.

Q. And in 2007 what had he contributed to the mortgage?

A. Whatever profits were made on the business as far as welling books from the 2004 books.

Q. Well, what profits were those?

A. Whatever income was generated from the sale of the books in 2004 from his project.

Q. Well, you filed joint tax returns; correct?

A. That's correct.
Q. And so how much income did you list for your husband in 2007?
A. I wouldn't know. That's the business end. His end of it I wouldn't know. Whatever is listed on the taxes.
Q. Well, in 2008 how much income did you list for your husband?
A. Again, whatever it says on the form.
Q. Well, you list on the form an income of $80,683.00. So what of that income would have been your husband's income in 2008?
A. Probably negligible.
Q. I'm sorry, that was your 2009 income you listed that. So that would be negligible and, yet, it was in recovery you said in October of 2010?
A. That's correct.
Q. And you were also asked when you were applying for the loan modification concerning your debts and you had a second mortgage; correct?
A. No, I don't.
Q. You don't have a second mortgage on the house?
A. No, I don't.
Q. You never took out any line of credit other than your principal mortgage. Is that your testimony?
A. There may be a line of credit but it's not a second

mortgage.
Q. Well, do you have a line of credit on the house?
A. Yes, there is a line of credit.
Q. And you've used that line of credit. Isn't that correct?
A. It had been used; yes.
Q. You didn't list that as one of your liabilities. Isn't that correct?
A. That was an oversight.
THE COURT: Who is that with?
THE WITNESS: That's with Indimac.
THE COURT: And what's the amount?
THE WITNESS: $30,000.00.
MS. STONE: Your Honor, I believe it's $40,000.00.
THE WITNESS: It may be $40,000.00. I'm not sure.
MS. STONE: I have no further questions.
THE COURT: Okay. All right. May the witness be excused, Mr. Schneider?
MR. SCHNEIDER: Yes.
THE COURT: Okay. You may step down. Thank you.
MR. SCHNEIDER: Oh, wait. No, I do have some questions. I'm sorry, my client was bothering me.
[Pause in proceedings.]
MR. SCHNEIDER: I'll be brief, Judge.

REDIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. Do you remember when the prosecutor asked you about the gas payment?

A. Yes.

Q. Do you get gas every month?

A. No.

Q. So was that to fill up your oil tank and your propane tank?

A. That's correct.

Q. And you don't do that every month; right?

A. No.

Q. What does your husband do for a living?

A. He's in publishing.

Q. He writes books; right?

A. Yes.

Q. And when he publishes a book does he receive royalties on those books?

A. Yes.

Q. Is that what you mean by "his income was on the way to recovery" that he hopes to publish a book in the future?

A. That's correct.

MR. SCHNEIDER: No further questions, Judge.

THE COURT: All right. You may step down. Thank you.

Okay. Yes, Mr. Schneider.

MR. SCHNEIDER: I'm going to call Barry Nesson.

THE COURT: And give me an offer of proof for Mr. Nesson.

MR. SCHNEIDER: Mr. Nesson is a real estate lawyer in Westchester County and he's going to testify about the valuation of the house; the real estate in this general area of Pound Ridge and also, should the house be foreclosed what the proceedings are and what the bank and anybody else with an interest in the house would likely recover if it's sold in that manner.

MR. SPECTOR: To clarify, is he going to testify about the appraisal that was submitted?

MR. SCHNEIDER: No, he's not the appraiser. He will give his -- I think he'll give his opinion. He's read the appraisal, he's looked at the Government's appraisal. He's going to give his opinion about those appraisals and what a certified appraisal is but he didn't appraise the property.

THE COURT: And so why is what he has to say relevant to this?

MR. SCHNEIDER: Well, I believe that Judge Korman wanted a finding because when we were arguing in front of him last time the Government raised the issue, well, this house is in foreclosure and so nobody is going to get any money out of it. We don't think that's true and we think his testimony will enlighten the Court as to that which is that even if the house is foreclosed, which we don't see as a likelihood, but even if it is he can testify as to the amount that the house would likely sell for, the procedures for what happens for the surplus money and the money left over that doesn't go to satisfy the mortgage and how that money could be secured by the Government and that's actually, I think, what Judge Korman wanted to know; what the equity was and specifically what the equity would be if the house was foreclosed.

MR. SPECTOR: If he wants to testify about foreclosure proceedings I suppose that might be tangentially relevant --

THE COURT: All right. Let's go. Let's do this pretty quickly.

MR. SPECTOR: -- but, Judge, just so we're clear though.

THE COURT: Yes.

MR. SPECTOR: But we do object to this witness testifying about the valuation of the home. There are professional appraisers who do that --

THE COURT: Yes, I understand that. I agree.

MR. SPECTOR: Thank you.

THE COURT: Go ahead.

MR. SCHNEIDER: Okay. We call Mr. Nesson to the stand.

THE CLERK: Raise your right hand.

(Barry Nesson, Defendant's Witness, Sworn.)

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Barry Nesson, B-A-R-R-Y N-E-S-S-O-N.

THE COURT: Go ahead. Yes, proceed.

MR. SCHNEIDER: Good morning, Mr. Nesson.

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. Have you been retained by the Federal Defenders to testify as an expert in this proceeding?

A. Yes, I have.

Q. Can you tell the Court your educational background?

A. I have an undergraduate degree, a masters degree in psychology and I have a law degree.

Q. And what kind of law do you practice?

A. Real estate and with a specialty in come commercial litigation and also largely in mortgage foreclosure related matters.

Q. And when were you first admitted as a lawyer in New York?

A. 1982.

Q. Other than foreclosure matters about how many mortgages have you worked on in your career as a lawyer?

A. How many mortgages?

Q. Yes.
A. Maybe 5,000 or 6,000.
Q. And where is the bulk of your business? What geographic location?
A. Geographically, Westchester.
Q. And how many foreclosures have you worked on as a lawyer?
A. Well, it's got to be several thousand.
Q. And how many have you worked on in the past few years since the problem with the mortgage markets?
A. Well, it's what I do regularly day in and day out.
Q. And who do you typically represent in, let's say, a foreclosure matter?
A. Well, my practice is a little bit unusual because I represent foreclosing plaintiffs. I represent defendants, parties being foreclosed. I represent -- I do some title work and I also represent investors. So that makes me a little bit unusual because few people do all -- what I call all four corners.
Q. So when you say you represent the plaintiff, that's a lender?
A. It would be a lender or it could be somebody who holds a tax lien. It could be somebody who is foreclosing.
Q. And you said you represent investors. What does that mean in this instance?
A. Well, if somebody goes to the courthouse, for example, and

they buy a property that's being sold at foreclosure I designate them generally as an investor. It could be a non-investor. It could be somebody -- an individual that wants to buy the property at foreclosure but I'd put it under kind of a general term.

Q. And aside from being a lawyer do you have any personal experience with buying and selling real estate in Westchester County?

A. Over the years. I've done it since the late seventies and I have done -- I have over the years also purchased a lot of properties at foreclosure or in connection with foreclosure and so forth.

MR. SCHNEIDER: Your Honor, I ask that the Court quality Mr. Nesson as an expert in the mortgage market and foreclosures in Westchester County.

MR. SPECTOR: No objection if it's limited to that.

THE COURT: Yes. Fine.

MR. SCHNEIDER: Okay.

THE COURT: He's received as such. Let's go.

BY MR. SCHNEIDER:

Q. In your business you are familiar with appraisals of property?

A. Yes.

Q. And about how many -- I assume you've reviewed many appraisals for your clients; correct?

A. Of course, many.
Q. In your business do you generally require more than one appraisal when somebody is buying or selling a home?
A. No, I'd probably go with one appraisal if it seemed like a reasonable appraisal.
Q. And in your experience how reliable is a certified appraisal?
A. Well, I would assume that an appraisal should be a certified appraisal. Sometimes you get what they call a buyer price opinion; a realtor, for example, who wants to list your house so it will give you what you want to hear but that would not be called an appraisal. So if you generally understand an appraisal it's somebody that's licensed, certified and has some expertise and training.
Q. And you've seen the appraisal that is Defendant's Exhibit
A. Is that correct?
A. Well, I've seen the appraisal. I'm not sure whether it's Defendant's Exhibit A.
Q. I'm going to tell you that it is the appraisal that Ms. Fusillo had done.
A. Yes.
Q. And that was done by a certified appraiser?
A. Yes.
Q. Now, you've also read the modification document from Indimac Bank. Is that right?

A. I looked at it.

Q. Okay. I think that's in evidence as Defendant's Exhibit C.

MR. SPECTOR: The complaint. It's B as in boy.

[Pause in proceedings.]

BY MR. SCHNEIDER:

Q. Now, this --

A. I don't have it in front of me, of course.

Q. That's okay. I would put it in front of you if I think you needed to look at it. This modification document, what it basically does is it adds the arrearage of the missed payments to the capital and sets basically a new capital amount at a different interest rate. Is that right?

A. Again, I'm not looking at it but --

Q. Okay. But generally that's what it does?

A. Correct.

Q. I'm going to show you and ask you to look at Page 2 and I'm just going to underline this amount and ask if you could look at it and tell me what the amount represents?

THE COURT: Are you looking at Page 2 of Exhibit C?

MR. SCHNEIDER: Yes.

BY MR. SCHNEIDER:

A. So they say added to the indebtedness, so it would be the principal and interest plus -- well, basically the principal plus what's accrued.

Q. So that amount which is -- what is it? Six hundred and twenty --
A. 627 roughly.
Q. That's basically the amount owed on the home at this point?
A. I would assume that that's the case.
Q. Okay. If that modification is accepted by the bank that will be the principal amount of the loan; correct?
A. The loan would be modified; yes.
Q. If that modification is not accepted --
A. Can I --
Q. Sure.
A. It would not be technically the principal but it would be the modification of the loan.
Q. The modified amount of the loan.
A. Right.
Q. If the modification isn't accepted --
A. I'm sorry?
Q. The Government has made some statements that they don't think this loan is going to be modified so I'm going to ask you some questions about if it's not modified.
A. I just didn't hear the word.
Q. If the loan is not modified how likely is it that the house would be foreclosed upon?
A. Well, it's kind of a general question. If either the

mortgagor would reinstate the loan, refinance the loan which is probably pretty remote from what little I've heard or it would be foreclosed upon. But the reinstatement is not the remote, it's the refinance that's remote.
Q. I understand you to say that it's unlikely that Ms. Fusillo in your opinion would be able to refinance this loan at this point?
A. Yes, but the reinstatement is not remote.
Q. And the reinstatement would be in your experience that she would pay the arrearage?
A. Correct.
Q. And then the loan would be reinstated at the initial terms?
A. That's correct.
Q. And the arrearage is somewhere between $70,000.00 and $80,000.00? Is that right?
A. That's what it appears to be.
Q. Okay. Explain -- if this house were foreclosed what would happen to it? How would the bank sell it?
A. Well, in New York state there's a judicial foreclosure process under the RPAPL, Real Property and Action Proceedings Law, so it would have to be -- and there was a complaint filed about a year or year and a half ago, I guess --
Q. Let me stop you there. A complaint filed in this case?
A. Right.

Q. Okay.

A. Okay. So in New York you have what they call judicial foreclosure. That's not every state. That's the reason I say it that way. So there's a procedure under the RPAPL that specifically designates what has to happen. This has to be a summons and complaint, everybody has to be served and it appears I guess they have been served, and then everybody will have had a chance to answer, after answers have been filed -- I'm not aware of any particular answers -- then the court would appoint a referee to compute and that's exactly the way it would be phrased and the referee is almost always an attorney. He would compute -- he or she would satisfy himself that this is the amount that's due based upon the interest and everything else unless they calculate it's -- he would run the numbers. Say it's 650. I'm pulling a number out of a hat. And then he would report back to the court in a report saying, I've calculated it, it can be sold as one parcel or it could be sold in more than one parcel but let's say it's sold as one parcel and I calculate this is the amount due. The court would take that report and then it would -- an application would be made for a judgment of foreclosure and sale and the court would issue a judgment saying that the amount due is -- again, I'm pulling a number out of a hat -- 650 and I now appoint that same referee, him or her, to go sell the property at the courthouse steps. You'd publish and you'd post and you'd let the world know that there's going to be a sale about 45 days later or whatever, depending, you know, how the law firm is backed up and the referee would come to the courthouse and say, okay, I'm here to sell X property, and anybody who wants to enter a bid would then enter a bid and there would be a public bidding. Does that answer your question.

Q. Yes. But you're familiar with these public bids in Westchester County generally?

A. Oh, very.

Q. And what about in the area of Pound Ridge?

A. Well, they sell --

Q. I mean properties in the area of Pound Ridge?

A. Well, I'm not an expert in Pound Ridge properties if that's what you're asking me but I understand how the foreclosure process works very well.

Q. At those public sales what is the population of buyers generally?

A. Well, they would probably break into two categories or three categories; one category obviously is the bank or the person who represents the plaintiff would show up to enter a bid, that's one. We'll forget about them. The other category would be investors who like to buy the property, then be able to turn around, fix it up or not fix it up and then, you know, sell it and make a profit. The third category I call "users" and it's pretty self-explanatory, they'd like to be able to own

that particular property. I generally would phrase it that way.
Q. And these -- in your experience in the real estate market in Westchester County what sorts of -- well, how much of a discount could these buyers expect over or under the appraised value of a home?
A. Well, it would depend on several factors it seems to me. There's no formula. You can't mix two chemicals and come up with an exact formula but basically it would be effected by the particular property and maybe it's location and a number of other factors.
Q. Well, let's say, a property worth about $900,000.00 in the area of Pound Ridge? A single family home.
A. Yes, I understand. Okay. So, for example -- one thing I didn't mention, it just didn't occur to me, is when the referee sells it he sells under what they call the terms of sale, it's like a contract. In other words, here's what you have to do, I'm selling it, you agree to buy it under the following terms, and almost invariably you have to close in thirty days, it's subject to everything and you don't have a right to necessarily get financing. If you can get a loan in thirty days and everything else, you know, good luck, but that doesn't give you an out and you put ten percent down. So let's say somebody buys a property for $900,000.00, they'd have to put $90,000.00, give a bank check to the referee and then close in thirty days

approximately. So it's not everybody that has the capacity just to buy an expensive house like that and obviously the pool of people that can buy houses in a very nice part of Westchester County at that kind of price range is limited. So it would seem that that pool would almost certainly or more likely have available to them the wherewithal -- let's call it the cash -- to be able to go and buy the property. So that limits the pool but it also means that this is the kind of -- this would be a population that would want to be able to get a nice house and if they can get a nice house with a slight discount, you know, maybe if they're buying a $900,000.00 house and they get $50,000.00 or $60,000.00 off and they're going to live there as opposed to flipping it -- I haven't defined that but okay, then that would still be pretty good.

Q. If I could just restate that you're saying that basically if you're going to bid at one of these public auctions you have to have cash or understand you're going to get financing within thirty days; right?

A. You have to be able to get financing pretty quickly.

Q. So basically you have to have access to cash or you're not going to make these bids?

A. Yes, an investor, for example, would you know, pool money together and be able to put money together and you know, be able to go out and buy the house and then if he or she wants to go out and get financing after that, that's fine. That's nobody's business.

Q. Are you able to state -- as I understand your testimony you say that -- is Pound Ridge a generally desirable area in Westchester County to live in?

A. Pound Ridge is considered a Tony [sic] community.

Q. And what are houses valued there generally?

A. Oh, there's a wide range. There's a lot of houses in Pound Ridge. I wouldn't be prepared to answer that question.

Q. But I understood your question a few minutes ago, you indicated that houses that are valued, let's say, around $800,000.00 or $900,000.00, it's possible for a house at that value for somebody to come in who has the cash to purchase it whereas that may not be likely in other areas of Westchester even at lower valuations. Is that right?

A. A user --

THE COURT: I don't think this is necessary.

MR. SCHNEIDER: Okay.

BY MR. SCHNEIDER:

Q. If the house is foreclosed and it goes at a public sale -- first of all, I'll back up. The bank protects itself for its investment. Is that right?

A. The bank would bid what they call the upset price. So let's say the date of the sale there's 650 due, the bank would probably bid $650,000.00 [inaudible] whatever.

Q. All right. But any amount over that, what's that called?

A. It's called surplus.
Q. Okay. What happens to surplus?
A. This is what they call -- also under the RPAPL is the surplus money proceeding. It's very specifically set forth under the Code and whoever is entitled -- whoever makes a claim for it based on priority would be able to go after and get that surplus.
Q. So that amount is --
A. Let me rephrase that. The first are judgment creditors, assuming they make a claim and, second, would be the owner of the equity of redemption, another way of saying the homeowner.
Q. Okay. So if somebody had a lien on that house they'd be first in line for whatever surplus was left; correct?
A. Yes.

THE COURT: So if somebody had a line of credit or a home equity loan they would get paid.

THE WITNESS: That's right, Judge. For example, Indimac is named as a defendant. Indimac was named so that Indimac would know to go and make a claim for it. That's right.

BY MR. SCHNEIDER:
Q. You heard Ms. Fusillo testify --
A. I did.
Q. -- about her conversation with the bank about modification?

A. Yes.
Q. Have you ever heard of that happening on other cases where somebody calls the bank --
MR. SPECTOR: Objection.
THE COURT: But it doesn't matter because, you know, if she doesn't have the modification we're in a completely different place. So I don't want to hear about whether that sounds like something that he's ever hear of happened or he's never heard it's happened.
MR. SCHNEIDER: I only ask him, Your Honor, because it was a specific question Judge Korman wanted answered.
THE COURT: Oh, whether people get loan modifications over the phone and have their paper follow up?
MR. SCHNEIDER: No. Whether somebody has been -- whether a bank would --
THE COURT: All right. If Judge Korman wants it asked, ask it and we'll listen.
MR. SCHNEIDER: Okay.
BY MR. SCHNEIDER:
Q. Have you ever heard that in other cases that somebody calls their bank asking for a modification and the bank advises them they won't consider a modification while you are current in your payments?
A. Yes, the banks won't consider it if they're currently making their payments.

Q. And have you had dealings with other people, even clients who have told you similar accounts?
A. Yes.
Q. Through your experience as a real estate lawyer in Westchester County are you familiar with the valuation of real estate in that County?
A. Yes, within limits.
Q. And you reviewed both the Government's and the defendant's appraisal of the Pound Ridge home. Is that right?
MR. SPECTOR: Objection. Outside the scope.
THE COURT: Sustained.
MR. SCHNEIDER: No further questions, Judge.
THE COURT: Okay. Anything?
MS. JAGER: Just a moment, Your Honor.
THE COURT: Okay.
MS. JAGER: May I have just one moment?
THE COURT: Yes.
[Pause in proceedings.]
MS. JAGER: Thank you, Your Honor.
THE COURT: Okay.
MS. JAGER: Good morning, Mr. Nesson.
THE WITNESS: Good morning.

CROSS EXAMINATION

BY MS. JAGER:

Q. You mentioned during your direct that reinstatement is not remote. Is that correct?

A. Reinstatement -- she has time to reinstate, of course.

Q. Do you know anything in particular about the home that's at issue in this case? Ms. Fusillo's home?

A. Other than what I've seen in the appraisal?

Q. Yes, have you seen the home?

A. No, I have not seen the home.

Q. So you've only viewed the appraisal?

A. That's correct.

Q. Have you viewed both appraisals that were done by both the Government and the defendant's wife?

A. I would -- I didn't let you finish the question. I apologize. Go ahead.

Q. Have you seen only one appraisal or more than one?

A. I saw the second appraisal just very briefly this morning.

Q. All right. Are you familiar with Ms. Fusillo's relationship with the bank?

A. I'm not.

Q. Are you aware of any liens that may exist or liabilities?

A. Well, I did look at the summons and complaint and I note that they named Ms. Fusillo and Indimac bank and I don't recall that they mentioned any other judgment creditors which would suggest that there are no other judgment creditors even though there may have been other judgments. I've heard the names mentioned but obviously they didn't come up or the bank didn't consider them to have a likely lien against the premises.

Q. But if there was a second mortgage or --

A. No, I said Indimac bank.

Q. Okay. If there was a line of credit, for example?

A. That's why I said Indimac bank. Yes, I agree with you.

Q. Were you involved at all in Ms. Fusillo's transactions with the bank?

A. No.

Q. So it's really just your speculation here that reinstatement is not remote in this case?

MR. SCHNEIDER: Judge, he's an expert witness.

THE COURT: Overruled. You can answer.

BY MS. JAGER:

A. I couldn't tell you exactly what she has in her bank account if that's what you're asking me and that's kind of what it sounds like you're asking me, whether she has the wherewithal -- the number to reinstate. I couldn't offer an opinion on that.

Q. Well, you stated on your direct that -- I believe your testimony is "reinstatement in this case would not be remote?"

A. I was comparing it with the likelihood of refinancing. Refinancing -- when you're in foreclosure your credit is ruined

-- is remote. People coming up with the money to reinstate is not remote. That happens.
Q. But in this case you said the possibility of reinstatement is not remote?
A. I thought I heard her say -- and I don't want to go over her testimony, that's not what I'm here for -- but I thought I heard her say that she's trying to -- something around trying to raise some money and maybe some family members or something and so if that's the case then she can come up with the deemed -- forgive me -- but the amount to reinstate.
Q. So it's your testimony that reinstatement is less remote than refinancing. Is that a more accurate --
A. Well, we're talking apples and oranges. Reinstatement is certainly a viable possibility. I would be amazed if she could refinance. Does that help you distinguish what I'm trying to communicate.
Q. I'm just trying to understand what you meant by reinstatement was not remote in this case.
A. In other words, people reinstate all the time.
Q. But you don't have specific knowledge besides the complaint about any other existing liabilities or judgments against Ms. Fusillo; correct?
A. That would not have anything to do with reinstatement.
Q. Or her relationship with the bank?
A. That would have nothing to do with reinstatement.

Reinstatement is a right she has by law. You know, if you can come -- if you're in default and then you owe -- let's call it $70,000.00, I don't know what the exact number is -- and you come up with $70,000.00, send a check to the bank for $70,000.00, the bank is going to take your $70,000.00 and then discontinue your action. It's mechanical in that respect.

Q. Mr. Nesson, who pays the legal fees when a home is in foreclosure?

A. The bank would make an application to the court, it's entitled judgment and foreclosure and sale for legal fees, and the court would either award them or not award them or they would award a portion thereof.

Q. And would they come out of the sale price of the home?

A. It would be added to the judgement of foreclosure and sale.

Q. You also mentioned earlier that a house that may be in foreclosure may be discounted but that depended on a number of factors; correct?

A. Are you asking me would the perspective person who bids at the courthouse want to take less than what the full judgment is? Is that what you're asking me, I'm not sure.

Q. I'm sorry. I'll rephrase the question.

A. Yes. Thank you.

Q. You spoke on direct about discounting; correct?

A. Correct.

Q. And you said that it depends -- on how much a house is discounted may depend on a variety of factors?
A. That's correct.
Q. And you mentioned one of those would be the location of the home?
A. The location, the condition, many factors.
Q. So what are those some of those factors?
A. Location, the condition, what somebody values the -- for example, let's say you had a judgment -- again, I'm going to deal with a hypothetical. If you had a judgment worth $5 million, let's say, because it hadn't been paid in years and high interest rate and somebody decided the property was worth -- what did I say $500,000.00 and somebody said the property is worth $200,000.00 they're not going to bid $500,000.00, they're going to discount it. But if you have a property where the value of the property greatly exceeds the judgment amount, then they're going to bid over the judgment.
Q. You also mentioned on direct, you were using an example of a home that was worth approximately $900,000.00 and you said that in Pound Ridge it might get a slight discount of $50,000.00 to $60,000.00 off?
A. Well, what I was trying to communicate is that a user as opposed to an investor would certainly pay much more because that person would not be looking to flip the property and have all the additional costs.

Q. But it's just as reasonable that somebody could purchase the home for $100,000.00 off that price; correct?
A. There's no -- you're not mixing two chemicals. I think that was the analogy that I used. It's hard to say. The person -- the user -- so it's a little bit hard to say but let me try to help you with it. First of all, you're asking me to anticipate what will be in a period of time but if somebody, for example -- I recall that this particular house was in a particular school district, well, every house is in a particular school district. If somebody wants to have a house in a particular school district and wants to be in a particular area and that house comes up, then somebody is going to wind up owning that house and they're going to be prepared to bid and if they can get that house for less than what they considered a fair market value they're going to be very happy.
Q. But the amount -- that slight discount that you were referring to on your direct, you gave an amount of $50,000.00 to $60,000.00 off and my question is isn't it just as reasonable that it could be $100,000.00 off or $150,000.00 off because all of these different variables may come into account; the condition, the location, the school district; correct?
A. Well, there's no exact science. You started to mix apples and oranges a little bit especially because the investor would be factoring a lot of -- would be adding a lot of other factors in but if -- and I can't tell you exactly how much less it

would sell for. I can't do that but I can tell you that if somebody wants the house as a user they're going to pay much more.
Q. But you don't really know what the discount would be in this case; correct?
A. Nobody can give you an exact number.
Q. With respect to surplus -- you talked about surpluses -- you gave an example of the home that was worth -- excuse me, where $650,000.00 was owed; correct?
A. I just pulled a number out of a hat.
Q. Right. But that was the example that you used; correct?
A. Yes.
Q. And that there are situations where the bank would then try to -- would offer the 651?
A. They would bid what they call the upset price. In other words, what's due in the judgment. If you added the whole judgment together including interest from the date of sale or whatever attorneys fees and whatever the referee computed and he or she came up with a number, call it 650, that's your upet price.
Q. And you've seen foreclosures like that before; correct?
A. Where the bank bids the upset price?
Q. Yes.
A. Of course.
Q. You mentioned earlier when you were talking about

appraisals that sometimes appraisers give people what they want to hear. Is that right?

A. Well, no, that's not exactly what I said. As I recall, I tried to distinguish between a certified appraisal and what they call a buyer price opinion. It's more like it comes from a broker as opposed to a credentialed appraiser.

Q. Are you aware of mortgage frauds where there are inflated appraisals even by certified appraisers?

A. Of course.

Q. Do you know the appraiser that was used --

A. I don't.

Q. -- in this particular appraisal?

A. I do not. But I will tell you by the way that --

MR. SPECTOR: Objection.

THE COURT: Oh, tell us. Tell us. Go ahead.

THE WITNESS: Appraisers have been chastened over the years because with the fraud that -- I've been in this for a long time and we used to see incredible numbers -- preposterous numbers if you will. You don't see the preposterous numbers because people might be afraid of going to jail if they come up with preposterous numbers.

THE COURT: For good faith.

THE WITNESS: That's what I was going to say.

BY MS. JAGER:

Q. So it's important for appraisers to be correct in their

appraisals to be accurate?
A. One would hope.
Q. But it's important -- as an attorney you counsel people, you help people make determinations about whether to sell or buy their home; correct, and you may rely on those appraisals and those appraisals may be important in the decision-making process of one of your clients; correct?
A. Well, yes. The answer is yes.
Q. So when you get information in an appraisal you count on that information being as accurate as possible?
A. Right. But you have to read through it and you look at it; does this make sense? Like you would read through any other document; does it make sense, does it appear to be credible or do you think the appraiser got it right like in anything else? Does this individual seem to have gotten it right?

THE COURT: Does the bank ever get their own appraisals?

THE WITNESS: Of course, all the time. More so now than ever before.

THE COURT: Yes.

MS. JAGER: Just one moment, Your Honor.

THE COURT: Yes.

[Pause in proceedings.]

BY MS. JAGER:

Q. Are you familiar with tax liens?

A. Very much so.

Q. And do those come ahead of other judgments and creditors?

A. Taxes come before. So, therefore, a tax lien constitutes a tax doesn't it.

Q. Yes.

A. Okay. No, I'm sorry, I didn't mean to say that --

THE COURT: She's competent to answer that.

THE WITNESS: I didn't mean to say it that way. I apologize. I didn't mean it that way.

THE COURT: Okay.

BY MS. JAGER:

Q. What happens -- I'll ask it anyway -- what happens in a foreclosure when there's a tax lien?

A. The Real Property Actions and Proceedings Law was amended in 1997 to provide that taxes had to be paid by the referee out of the sales proceeds. It used to be that that was the case in cities over either 300,000 or 1 million. I can't remember. That was changed. Now, I won't tell you that there aren't exceptions made to that because sometimes the attorney -- if I'm giving you more than you want I apologize.

THE COURT: No, no. Go ahead. Just go ahead.

BY MS. JAGER:

A. Okay. Sometimes judgments are written in certain ways that the attorneys kind of get around it and the court signs off on it and there's been cases saying that the judge signs off on the judgment that way, they don't have to pay it, but basically the state law says now since 1997 everywhere taxes have to be paid first. That's the law in New York.

Q. And when is that paid?

THE COURT: They have a priority.

BY MS. JAGER:

A. They have a priority. Of course, Judge.

Q. And when is that paid?

A. I'm sorry, I didn't hear.

Q. When is that paid?

A. Oh, so that would be paid when the -- so when the sale takes place and somebody comes to the closing, whoever purchases the property, let's say it sold for $1 million, you give $1 million -- I'm really generalizing but you give $1 million to the referee and the referee then writes checks out and the first check he's supposed to write to himself. Well, the first check he writes to himself to pay himself but the next check, seriously is to pay the taxes.

MS. JAGER: Just a moment, Judge.

THE COURT: Sure.

[Pause in proceedings.]

MS. JAGER: Just a few more questions, Your Honor.

BY MS. JAGER:

Q. Mr. Nesson, you said earlier it was common to have more than one appraisal; correct?

A. No, I don't think I said that it was common but there are times when there's more than one appraisal. I don't think I said that it was common.

Q. I don't mean to mischaracterize your previous statement but you've seen numerous occasions when there was more than one appraisal; the bank might get an appraisal done --

A. There have been times when there's been but I certainly wouldn't characterize it as common.

Q. And when that happens is it possible that the two different appraisals will have different numbers, it will come up with different estimates of the value of the property?

A. Well, you know, we're going a little far afield and I'll tell you why, respectfully --

MR. SPECTOR: Objection, Judge.

THE COURT: Let him answer. Go ahead.

BY MS. JAGER:

A. I mean there are times when you get different appraisals for different kinds of reasons. So are we talking about what circumstance? If you're a --

Q. If you have two different licensed appraisers?

A. Well, for example, if you're talking about like a matrimonial maybe you'll end up with three and they'll all be fighting about the appraisal but if you're talking about a basic value where somebody -- you say, look, I want to know what my house is worth, or the bank says, I want to know what this house is worth, or if you have a mortgage, right, you're ordinarily run of the mill, every day kind of occurrence is one appraisal.

Q. But in other situations there's more than one appraisal?

A. There are many times people get appraisals. I'm not trying to avoid your question I'm just trying to explain that you're asking a question that's a little bit general and it's hard to answer because there are many times people get appraisals. You get appraisals for different kinds of reasons.

Q. And sometimes there will be multiple appraisals on the same property; correct?

A. Yes.

Q. And they'll both be by licensed appraisers; right?

A. Right, it's not under the usual circumstance somebody wants to know what their house is worth.

Q. And you've seen circumstances where there will be two different appraisals both by licensed appraisers and they'll come up with different numbers?

A. Yes, there have been times that I've seen that, of course.

MS. JAGER: Can I have just one moment, Your Honor?

THE COURT: Yes.

[Pause in proceedings.]

MS. JAGER: Nothing further from the Government.

THE COURT: Okay.

MR. SCHNEIDER: Just briefly.

REDIRECT EXAMINATION

BY MR. SCHNEIDER:

Q. Mr. Nesson, is it your opinion that is Ms. Fusillo could come up with the cash to pay off the arrearage on her mortgage that it would be reinstated?

A. It's not my opinion, it would be.

Q. As a matter of law it would be?

A. Oh, absolutely.

Q. Are you aware of any tax liens on this property?

A. I'm not aware of any tax liens.

Q. Did you do a search for that do you recall?

A. I contacted the town of Pound Ridge. This was the town of Pound Ridge and they didn't report any but I didn't go to the tax procedures office.

Q. You reviewed both Defendant's Exhibit A, which is the appraisal that Ms. Fusillo had done, and an appraisal performed by somebody hired by the Government. You reviewed both of those. Is that correct?

A. I did. The latter briefly. Very briefly.

Q. If you had two appraisals and in one the appraiser was allowed to go inside the house and inspect the house and go anywhere he wanted and get an appraisal and another only went to the outside of the house and looked around which would you think would be more accurate?

MR. SPECTOR: Objection.

THE COURT: Sustained.

MR. SCHNEIDER: Well, Judge, there's --

THE COURT: Well, we just -- look, we're not going down this appraisal road. We're not.

MR. SCHNEIDER: But the Government went down it a little bit. Can't I go --

THE COURT: They just went down over circumstances where there are different numbers -- where they appraise property at different numbers. I know where you're trying to go and you're not going there.

BY MR. SCHNEIDER:

Q. One last question. In your experience, other people have been given the same advice that Ms. Fusillo was given which was that, stop paying your mortgage, we will consider a modification?

A. Yes, I'm aware of that.

MR. SCHNEIDER: No further questions, Your Honor.

THE COURT: Okay. You may step down. Thank you. I think. Yes?

MR. SPECTOR: No recross.

THE COURT: Okay. What now?

MR. SPECTOR: Well, Judge, we have a couple of exhibits to offer as I mentioned up on the witness stand.

THE COURT: Yes.

MR. SPECTOR: We would offer, I suppose under the same theory --

THE COURT: Yes.

MR. SPECTOR: -- where the defense offered their appraisal we'd offer our appraisal, Government Exhibit 2.

THE COURT: All right.

MR. SPECTOR: And we printed a copy of this to defense counsel last night. That appraisal is for $720,000.00.

THE COURT: Right.

MR. SPECTOR: In addition I just want to point out -- and I think it's appropriate for the Court to take judicial notice of this but there's at least one sort of glaring problem with the defense appraisal and that is if you look on the third page where it lists the comparables you'll see at the bottom the appraiser indicates that the direct sales comparison approach is considered the primary indicator which I understand --

THE COURT: Where are you? On page?

MR. SPECTOR: The third page of the document. You can see sort of towards the top it lists "comparable properties." There's four columns.

THE COURT: Yes, I see it. Yes.

MR. SPECTOR: There's a note at the bottom which I read to the effect that the appraisal was based primarily on the value of comparable properties so that the comparables are particularly important to the appraisal.

There's -- right at the top next to each address right underneath it says "Proximity to subject" and there's a distance listed.

THE COURT: U-hum.

MR. SPECTOR: We went on Google Maps and there's quite a discrepancy between what's listed here and what's listed on Google Maps.

THE COURT: You mean the distance?

MR. SPECTOR: The distance. The most glaring example was 87 South Bedford Road. It's listed as .99 miles. On Google Maps it's listed as 5.5 miles. 198 Westchester Avenue, on this appraisal it's listed as .85 miles, on our Google Maps it's listed as 3.5 miles.

To be fair, our appraisal, the distances are somewhat off with Google as well but not nearly as dramatically.

What's disturbing to us is that this suggests that the appraisal was presented falsely in such a way as to make these properties appear closer than they really are to be more true comparables and if you compare that with our appraisal which by the way has five comparables, some of them are further away -- are three or four miles and it's reflected on the appraisal -- but two of the properties are on the same road within less than a mile so I think just based on the face of the documents our appraisal is more accurate.

THE COURT: Yes.

MR. SCHNEIDER: I disagree. We had -- there's a --

THE COURT: You know, I'll look at it. I don't need to hear you argue about it.

MR. SCHNEIDER: That's fine. That's fine.

THE COURT: Okay. Anything else, Mr. Schneider?

MR. SCHNEIDER: No, although I think our appraisal is much more accurate than the Government's but I won't argue that now.

THE COURT: I'm sure that you do but we're not going to argue about the appraisals.

MR. SCHNEIDER: No, nothing else.

THE COURT: Okay. So, really, isn't this all premature because we don't know the status? I mean I'm fine --

MR. SCHNEIDER: Well, I mean I can --

THE COURT: Don't interrupt me.

I'm fine having taken this testimony but, you know, if the Government is correct and she's not granted this loan modification we have a different situation so why don't we just see how that plays out?

MR. SCHNEIDER: I think that's probably --

THE COURT: And then we know where we are.

MR. SCHNEIDER: I think that's probably --

THE COURT: I mean this may have helped us today with other facts that we need to get on record but I think we need to play that out and I think that's going to play out very quickly.

MR. SPECTOR: I agree, Your Honor. If we could maybe have a control date of a week from today?

THE COURT: That's what I was thinking.

MR. SCHNEIDER: Don't we have a date Friday?

MR. SPECTOR: We have a status conference before Judge Korman on Friday but I think it's appropriate since this matter is still before the Court --

THE COURT: I'd be happy to have Judge Korman handle it on Friday but I don't think that's what he has in mind.

MR. SCHNEIDER: Next week is fine.

THE COURT: So let me just look at my book.

[Pause in proceedings.]

THE COURT: I mean my sense is within -- really, within a week this plays itself out; right?

MR. SPECTOR: I think that should be sufficient time, Your Honor.

THE COURT: Even Monday.

MR. SCHNEIDER: That's fine.

THE COURT: Does Monday work?

MR. SPECTOR: Can we do Tuesday, Your Honor?

THE COURT: Yes, we can do Tuesday. And then just so what I have in mind is you'll come back Tuesday, we'll know exactly what the situation is with respect to modification or whatever it is and then if there are any other facts that you want to put before me we can finish the hearing and I'll hear argument and I may ask you for some kind of letter submission.

What time do you want -- let's do -- can you do 10:30?

MR. SCHNEIDER: Yes.

THE COURT: Okay.

MR. SPECTOR: That's fine, Judge. Thank you.

THE COURT: Great. 10:30. Okay, thanks, everybody.

MR. SPECTOR: Thank you, Judge.

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I certify that the foregoing is a transcript from an electronic sound recording of the proceedings in the above-entitled matter.

CARLA NUTTER

Dated: December 14, 2010